

CONSIDERATIONS ON THE COST OF ARBITRATION

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ABSTRACT: *The expenses necessary for the unfolding arbitral process are generally higher than those incurred by the parties in the case of proceedings before national courts, reason for which arbitration is considered a "luxury justice". This study aims to analyze the content of the concept of costs within the international commercial arbitration, considering the provisions contained in the relevant regulations of the arbitration institutions and the opinions expressed by the Romanian and foreign legal literature but also by the relevant case law.*

KEY WORDS: *arbitration costs, international commercial arbitration, arbitral tribunal.*

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In international commercial arbitration¹, the costs are usually of two types: procedural costs including fees and expenses related to the arbitrators and the arbitration institutions and the costs of the parties which in their turn include the costs for the preparation and presentation of the case before the arbitral tribunal². The costs necessary for the unfolding arbitral process are generally higher than those incurred by the parties in the case of a trial within the national courts, because in the latter situation it is not necessary to pay any fee for the judges or for the proper course of the dispute³.

Most of the arbitral rules contain provisions related to arbitral costs.

Article 40 of the UNCITRAL rules provides that the arbitral tribunal shall establish the costs of arbitration in the final award and, if it deems appropriate, in another decision. According to these rules, the term "costs" includes: the fees for the arbitral tribunal, the

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¹ Regarding certain evolutionary aspects of arbitration, see: D. Chilea, *Drept Internațional Public*, Hamangiu Publishing House, Bucharest, 2007, pp. 145-149.

² See Micha Bühler, *Awarding Costs in International Commercial Arbitration: an Overview* in Swiss Arbitration Association Bulletin 2004, no. 2, p. 250 and Frank-Bernd Weigand, *Practitioner's Handbook on International Commercial Arbitration*, Oxford University Press Publishing House, New York, 2009, p. 1358.

³ See Alan Redfern, Martin Hunter, *Law and practice of international commercial arbitration*, Sweet & Maxwell Limited Publishing House, London, 2004 p. 226.

reasonable travel and other expenses incurred by the arbitrators, reasonable costs of expert advice, the reasonable travel and other expenses of witnesses.

The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case is expressly mentioned in Article 41 paragraph 1 of the UNCITRAL rules. Of course, in case there are expenses and fees set by the arbitral institution, these shall be applied.

According to Article 42, paragraph 1 of the UNCITRAL rules, the costs of the arbitration shall, in principal, be borne by the unsuccessful party or parties, however the arbitral tribunal may apportion each of such costs between the parties, if it determines that apportionment is reasonable, taking into account the circumstances of the case. Therefore, the payment of the expenses by the unsuccessful party is not compulsory in all cases.

There is the possibility for the arbitral tribunal to request the parties to open a deposit account to cover certain arbitral costs which may be supplemented during the course of the arbitral proceedings as provided by the Article 43, paragraph 1 and 2 of the UNCITRAL rules.

According to the provisions found in the Article 35 of the arbitral procedure rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, the arbitral costs contain: registration fee, administrative fee, costs regarding evidence, translation of documents, costs regarding debates, arbitrators' fee, lawyers' fee, advisors' fee and experts' fee, travel expenses of the parties⁴, arbitrators, witnesses, experts and advisors and other expenses arising from the arbitration proceedings. Arbitral costs include expenses incurred by the party for a preliminary general legal advice on the prospects, documentation, references to law, international conventions, procedures etc. aiming to recover the claim⁵.

Registration fee and arbitration fee remunerates the services provided by the Court of Arbitration in the organization and conduct of institutionalized arbitration. In the case of *ad hoc* arbitration the component representing the administrative fee of the arbitral fee remunerates the services provided by the Court of Arbitration and shall be paid according to the Rules regarding the arbitral fees and costs.

As for the amount of fees established by rules regarding arbitral fees and costs, they are related to a single arbitrator in the case of institutional arbitration and in the case of *ad hoc* arbitration the arbitrators' fees are provided and paid according to the agreement of the parties, stipulated in the arbitration agreement. Only if the registration fee, administration fee and arbitrators' fees are paid according to the Rules on arbitration fees and costs the request for arbitration will be accepted and the arbitration proceedings will start. (Article 36 of the Rules of Arbitration Procedure of the International Commercial Arbitration Court)

Rendering meaning to the contractual arbitration component expression, Article 36, paragraph 6 and 7 of the Rules of the International Commercial Arbitration Court provides that the parties may agree on the sharing of arbitration costs and in the absence

⁴ See Arbitration Award of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania no. 110 of 30 October 1996, published in *Jurisprudența comercială arbitrală 1953-2000*, Bucharest, 2002, p. 41.

⁵ See Arbitration Award no. 83 of 11 July 1997, published in *Jurisprudența comercială arbitrală 1953-2000*, Bucharest, 2002, p. 41.

of such agreement the arbitration costs are borne by the party which has been unsuccessful in whole or proportional to the claims admitted⁶.

The Rules of Arbitration Procedure of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania also allow the arbitral tribunal to reduce the lawyers' fees, the experts' fees and the interpreters' fees whenever it finds, reasoned, that they are too large compared to the value of the dispute or the performed service (Article 36, paragraph 8). However, regarding the relationship between lawyer and his client, the action taken by the arbitral tribunal will not produce any effect, according to the same text.

Expenses will be awarded by the arbitral tribunal to the extent they will be appreciated as justified, according to their need and usefulness, related to the circumstances of the case. Thus, as noted in a case, if for the same settled hearing the foreign party had several disputes with the same defendant company, with its headquarters in Bucharest, filing for each litigation application for the payment of travel expenses, they may be granted only once⁷. In another case, it was considered that the applicant's request that all his travel expenses for a certain hearing at the Court of Arbitration to be borne by the defendant because the dispute could not be settled due to failure to file the Statement of defense, is unfounded since the prolongation was ordered by the arbitral court for an expertise⁸.

The rules set by the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania distinguish between the arbitration costs and the unnecessary costs.

When applying this provision, the arbitration case law has shown that the sphere of the arbitration costs include the ordinary and inherent costs necessary for the settlement of the dispute, while the unnecessary costs are regarded as abnormal expenses that are generally caused by the obstructionist and dilatory maneuvers of the opposing party and features a civil offense⁹. Unnecessary costs will be paid by the party responsible for causing those expenses, as compensation for damage, as provided by Article 36, paragraph 9 of the Rules of Arbitration Procedure of the International Commercial Arbitration Court.

Requesting for arbitration costs is seen as an ancillary request. Given the principle of availability, arbitration costs will be granted only at the request of the interested party. For that purpose, an award of the International Commercial Arbitration Court held that the applicant has applied for the defendant to pay the costs incurred in the arbitration process consisting of arbitration fees and attorney fees, and not all expenditure categories, in which situation he won't be granted the costs featured by the expert fees¹⁰. In the absence of the application regarding costs, the judgment can only be that of denying the arbitration costs.

⁶ See Arbitration Award of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania no. 87 of 2009, published by Vanda Maria Vlasov, *op.cit.*, pp. 52-53.

⁷ See Arbitration Award no. 19 of 20 January 1982, published in *Jurisprudența comercială arbitrală 1953-2000*, Bucharest, 2002, p. 41.

⁸ See Arbitration Award no. 82 of 11 March 1982, published in *Jurisprudența comercială arbitrală 1953-2000*, Bucharest, 2002, p. 41.

⁹ See Arbitration Award no. 1 of 8 January 2004, decided in the file no. 304 din 2003 of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, published in the review *Revista Română de Arbitraj*, 2010, no. 1(13), p. 62.

¹⁰ See Arbitration Award no. 73 of 30 March 2009, published by Vanda Maria Vlasov, *op.cit.*, p. 59.

Regarding arbitration costs, it is compulsory to analyze the position where the litigation is terminated as a result of the waiver of the applicant or pursuant to a conclusion of a transaction by the parties. Thus, in case of withdrawal of the request for arbitration before the issuance of subpoenas for the first hearing, the arbitration fee is reduced by 50 % of its amount, as provided by Article 4, paragraph 1 of the Rules on arbitration fees and costs of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania. In such a position, basically, there can be no expenses incurred by the other party in the process.

In case where as a result of reconciliation of the parties¹¹ or the arbitration request withdrawal¹² the dispute terminates at the first hearing, the arbitration fee is reduced by 25 % of its amount, as provided by Article 4, paragraph 2 of the Rules on arbitration fees and costs of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania¹³. *Per a contrario*, if the request for withdrawal is filed after the first hearing, these provisions shall not be applicable¹⁴. It was also decided that the reimbursement request of arbitration costs is not accepted if the tax paid by the applicant is the minimum one, in this circumstance being irreducible¹⁵.

In case of arbitration application withdrawal, if the applicant's withdrawal was filed after the communication of the arbitration application, at the defendant's request the applicant will be forced to pay arbitration costs¹⁶.

If the defendant admits the applicant's claims on the first hearing, in the absence of a provision contained in the Rules of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania, the provisions of the Article 454 of the Romanian Code of Civil Procedure of 2010 republished will apply. Therefore, only if the defendant is in default¹⁷ before the application for arbitration or shall be deemed in default he will be ordered to pay the arbitration costs.

An award¹⁸ of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania held that in case of the acknowledgement of the debt prior to the issuance of subpoenas, and if this acknowledgement is not followed by actual payment of the amount acknowledged in which the arbitration costs is included, the court compels the defendant to pay the arbitration costs to the applicant. As far as we are concerned we do not agree with this interpretation that departs from the purpose of Article 454 of the Romanian Code of Civil Procedure of 2010, republished.

¹¹ See Arbitration Award no. 79 of 9 April 2009, published by Vanda Maria Vlasov, *op.cit.*, p. 61.

¹² See Arbitration Award no. 94 of 30 April 2009, published by Vanda Maria Vlasov, *op.cit.*, p. 61.

¹³ See Arbitration Award no. 69 of 30 March 2011 in the file no. 412 of 2010, not published; Arbitration Award no. 33 of 15 February 2011 in the file no. 298 of 2011, not published; Arbitration Award no. 129 of 7 June 2011 in the file no. 55 of 2011, not published; Arbitration Award no. 121 of 26 June 2011 in the file no. 315 of 2010, not published; Arbitration Award no. 118 of 24 May 2011 in the file no. 205 of 2010, not published.

¹⁴ See Arbitration Award no. 67 of 29 March 2011 in the file no. 467 of 2010, not published.

¹⁵ See Arbitration Award no. 155 of 29 June 2011 in the file no. 57 din 2011, not published.

¹⁶ See Arbitration Award no. 239 of 12 December 2008, published by Vanda Maria Vlasov, *op.cit.*, p. 60.

¹⁷ See Arbitration Award no. 97 of 2 December 1997, published in *Jurisprudența comercială arbitrală 1953-2000*, Bucharest, 2002, p. 40 and Arbitration Award no. 246 of 2 December 2010 in the file no. 361 of 2010 of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, not published.

¹⁸ See Arbitration Award no. 97 of 2 September 1997, published in *Jurisprudența comercială arbitrală 1953-2000*, Bucharest, 2002, p. 40.

Certain provisions relating to arbitration costs are also found in the Rules of the International Arbitration Court of Paris. According to Article 37 of these rules, the costs of arbitration will include fees and expenses of the arbitrators, plus the administrative fees set by the Court, in accordance with the scale in force in the beginning of the arbitration proceedings, the costs and expert fees and other legal expenses incurred by the parties.

Respecting the scale to determine the amount of the arbitrators' fees is not always mandatory. Thus, according to Article 37, paragraph 2 of the same rules, the Court may determine that the arbitrators' fee shall be higher or lower than those resulting from the scale, if it considers that such action is necessary due to exceptional circumstances. As for the other costs, except those determined by the Court, the arbitral tribunal may decide upon any time during the proceedings.

In its final award the Court will determine the arbitration expenses and will decide which of the parties and to what extent will have to support the cost, as provided by Article 37, paragraph 4 of the Rules of the International Court of Arbitration in Paris.

An arbitration award of the International Court of Arbitration in Paris stressed that without the existence of any of the criteria in terms of expenditure, it is left to the mercy of the arbitral tribunal¹⁹.

A study²⁰ conducted on the awards issued by the International Court of Arbitration in Paris in the period 1989-1991 concluded that in cases where the applicant was given a favorable judgment, he was granted a substantial part of arbitration costs in most cases, and the legal expenses in almost half of cases. In circumstances where applicants were granted only partially the adverse legal expenses, the arbitrators ordered each party to bear their own legal costs and share the procedure costs. Ultimately, in cases where the applicant has obtained by judgment less than half the amount requested through the arbitration application, the arbitral tribunal decided each party to bear its own costs or the applicant to pay all or part of the costs of arbitration incurred by the defendant²¹.

Lack of criteria regarding delimitation of the two types of costs and their grant has been criticized in the legal literature²². According to an author, the distinction between the two categories of costs may be justified by the fact that one of the parties and not the arbitral tribunal, has determined, in bad faith, costs made by the other party²³.

Rules of the International Court of Arbitration in London contain provisions relating to arbitration costs in Article 28 entitled "arbitration and legal costs".

The expenses related to arbitration procedure shall be determined by the Court of Arbitration in accordance with the chart of costs. The parties are held jointly to pay these expenses. (Article 28.1.)

According to Article 28.2. of the Rules, the total arbitration costs will be mentioned in the judgment issued by the arbitral tribunal. Unless the parties have agreed otherwise in writing, the arbitral tribunal shall determine the extent to which each party will bear all or

¹⁹ See Gary B. Born, *International Commercial Arbitration*, Kluwer Law International Publishing House, Holland, 2009, p. 2499.

²⁰ See Micha Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, in Swiss Arbitration Association Bulletin, 2004, no. 2, p. 261.

²¹ See Gary B. Born, *op.cit.*, p. 2500.

²² See Micha Bühler, *op.cit.*, p. 262.

²³ See Markus Wirth, Article 189 PIL, in *International Arbitration in Switzerland*, note 58, quoted by Micha Bühler, *op.cit.*, p. 262.

part of the arbitration costs. If the arbitral tribunal determines that all or part of the arbitration costs will be incurred by a party other than the one that has paid, then the latter will be able to reclaim from the first.

The arbitral tribunal will be able to rule by award that all or part of the legal costs incurred by a party to be paid by the other party, unless the parties agree otherwise. The arbitral tribunal shall determine and establish the amount of expenditure for each component thereof. (Article 28.3)

The award of the arbitral tribunal on forcing one party to pay for the arbitration costs will have to take into consideration the success or the failure of the party unless the arbitral tribunal considers that such an approach is not appropriate. (Article 28.4)

In case the arbitration is abandoned, suspended or terminated by a transaction or any other method before the final judgment, the parties shall remain bound jointly to pay the procedure costs, the way they were determined by the Court.

Analyzing the main rules of arbitration institutions one may conclude that they grant arbitrators broad powers to dispose in what concerns the grant costs, taking into consideration the success of the party in terms of the award issued on the merits, and the reasonable feature of the costs incurred by the party²⁴.

The drafters of the UNCITRAL Model Law left the matter of arbitration costs unregulated, considering that uniform regulation is not suitable in this regard²⁵.

Although many of the states' laws do not contain provisions on arbitration costs, the power of arbitrators to rule on this matter²⁶ is fully accepted.

²⁴ See Gary B. Born, *op.cit.*, p. 2497.

²⁵ See Report of the Working Group on International Contract Practices A/CN.9/216 of 23 March 1982, p. 99 available on <http://www.uncitral.org>.

²⁶ See Gary B. Born, *op.cit.*, p. 2491